Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

TONY RAVELO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI REVIEW

On Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Eleventh Circuit's opinion in the instant case regarding the enhancement of the Petitioner's sentence based upon the quantity of cocaine involved in the conspiracy, violated this Court's holding in ***Apprendi v. New Jersey,*** 530 U.S. __, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and/or ***Jones v. United States,*** 526 U.S. 277, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), where: ***(A)*** the Indictment did not charge the Petitioner with conspiring to import over five (5) kilograms of cocaine, ***(B)*** the trial court directed the jury not to determine the quantity of cocaine, and ***(C)*** the Petitioner received a life sentence through the application of the enhanced penalty provisions of 21 U.S.C. § 960(b)(1)(B) which require a factual finding that the Petitioner conspired to import over five (5) kilograms of cocaine?

II. Whether an Indictment that does not allege the minimum quantity of drugs required under the charging statute fails to set forth an essential element of an offense, and/or violates the Fifth Amendment Due Process rights and Sixth Amendment guarantees of notice and jury trial by providing that a defendant's maximum punishment may be increased from a maximum of 40 years to life imprisonment based solely

upon a finding by a sentencing judge under a preponderance of the evidence standard, without notice by indictment and jury trial, that the defendant had the requisite intent necessary to establish a that he conspired to import five (5) kilograms of more of cocaine?

III. Whether a trial court must sentence a defendant whose drug conviction violates ***Apprendi v. New Jersey,*** 530 U.S. __, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and/or ***Jones v. United States,*** 526 U.S. 277, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), to an offense level under the United States Sentencing Guidelines that is the lowest possible level for the drug specified in the indictment and charging statute?

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OPINIONS BELOW

The unreported opinion of the Eleventh Circuit was entered on July 31, 2000. (Pet. App. 27-43). The Eleventh Circuit's unpublished order entitled "On Petition(s) for Rehearing and Suggestion(s) for Rehearing En Banc," was entered on September 8, 2000 (Pet. App. 58), and the Eleventh Circuit's Mandate issued on September 20, 2000. (Pet. App. 59).

The appeal to the Eleventh Circuit arose from the Petitioner's Judgment and Commitment entered on August 27, 1998, after a jury trial. (Pet. App. at 12-26).

JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit was entered on July 31, 2000. A timely Petition for Rehearing *En Banc*, was filed on August 20, 2000, and on September 8, 2000, the Eleventh Circuit entered an order denying the Petition for Rehearing *En Banc*. (Pet. App. at 58). Thereafter, on September 20, 2000, the Eleventh Circuit issued a Mandate on its Judgment. (Pet. App. at 59).

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is conferred under Title 28 U.S.C. § 1254(1) and Sup.Ct. Rule 10.

CONSTITUTIONAL PROVISIONS & STATUTES

U. S. Const., amend V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const. amend VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

21 U.S.C. § 952(a)
Importation of Controlled Substances - Excerpt [1]

(a) Controlled substances in schedule I or II and narcotic drugs in schedule III, IV, or V; exceptions

It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that . . . [certain listed substances][2] . . . may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium . . . .

21 U.S.C. § 960. Prohibited acts A - Excerpt [3]

(a) Unlawful acts

Any person who--

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or

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[1] The exceptions were omitted from this Excerpt. For the full text of 21 U.S.C. § 952, see Pet. App. at 60-61.

[2] See, Pet. App. at 60-61.

[3] Only an except regarding the penalty provisions for cocaine violations are set forth herein. For the full text, see Pet. App. at 62 -68.

exports a controlled substance,

(2) contrary to section 955 of this title, knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or

(3) contrary to section 959 of this title, manufactures, possesses with intent to distribute, or distributes a controlled substance,

shall be punished as provided in subsection (b) of this section.

(b) Penalties

(1) In the case of a violation of subsection (a) of this section involving--

* * *

(B) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(i) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(ii) cocaine, its salts, optical and geometric isomers, and salts or isomers;

(iii) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(iv) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in clauses (i) through (iii);

(C) 50 grams or more of a mixture or substance described in subparagraph (B) which contains cocaine base;

* * *

the person committing such violation shall be sentenced to a term of imprisonment of not less than 10 years and not more than life and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than 20 years and not more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. Any sentence under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under

this paragraph. No person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein.

(2) In the case of a violation of subsection (a) of this section involving--

* * *

(B) 500 grams or more of a mixture or substance containing a detectable amount of--

(i) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(ii) cocaine, its salts, optical and geometric isomers, and salts or isomers;

(iii) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(iv) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in clauses (i) through (iii);

(C) 5 grams or more of a mixture or substance described in subparagraph (B) which contains cocaine base;

* * *

the person committing such violation shall be sentenced to a term of imprisonment of not less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years and not more than life, a fine not to exceed the greater of that

authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this paragraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this paragraph. No person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein.

(3) In the case of a violation under subsection (a) of this section involving a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug

product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or flunitrazepam, the person committing such violation shall, except as provided in paragraphs (1), (2), and (4), be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years and not more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding the prior

sentence, and notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this paragraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

* * *

21 U.S.C. § 963. Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

U.S.S.G. § 2D1.1[4]

§ 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy. *See, Pet. App. at* ____ - ____.

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[4] The text of U.S.S.G. § 2D1.1covering cocaine offenses is reproduced in Petitioner's Appendix at pp. ___ -___.

IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

TONY RAVELO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Tony Ravelo, Defendant and Appellant in the courts below, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeal for the Eleventh Circuit entered in this case on July 31, 2000, and Order entered on September 7, 2000, denying his Petition for Rehearing and Suggestion for Rehearing *En Banc.* Said Petition specifically requested a rehearing as to the quantity of drugs attributed to *Ravelo* in light of this Court's opinions in ***Apprendi v. New Jersey,*** 530 U.S. __, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and/or ***Jones v. United States,*** 526 U.S. 277, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). (See, Pet. App. at 27-43).

STATEMENT OF THE CASE

A. *Proceedings in the Courts Below:*

The second superseding indictment upon which Petitioner *Ravelo* was tried,[5] like all earlier indictments, alleged in Count I that the defendants conspired to import an unspecified "measurable amount" of cocaine in violation of Title 21 U.S.C. § 952, all in violation of Title 21 U.S.C. § 963.[6]

After the trial court instructed the jury, *inter alia,* that the Government was not required to prove the actual amount of cocaine that was the subject of the offense, the jury convicted *Ravelo* of the conspiracy to import.[7] (R11-797). The trial court subsequently sentenced *Ravelo* on August 26, 1998, under U.S.S.G. Criminal History Catetory I, to life imprisonment pursuant to Title 21 U.S.C., § 960(b)(1)(B), based upon the trial court's finding by

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[5] Second Superseding Indictment filed on October 30, 1997. (Pet. App. at 7-11).

[6] The sentencing provisions for Sections 952 and 963 are set forth in Title 21 U.S.C., § 960. (See Pet. App. at 62-68).

[7] At trial, *Ravelo* counsel presented an entrapment defense, and additionally argued that he was not guilty because the proof at trial showed multiple conspiracies, because he withdrew or terminated the initial conspiracy for 800 to 1,000 kilograms, and was further coerced and placed under duress to continue to engage in a smaller conspiracy involving 300 to 365 kilograms of cocaine. (R10-549-54, R10-561-66).

a "preponderance of the evidence," that *Ravelo* intended to and agreed to import over five (5) kilograms of cocaine. (R1-159, R12-80-81).

Without oral argument, the court of appeals affirmed *Ravelo's* conviction and sentence,[8] and denied his Petition for Rehearing and Suggestion for Rehearing *En Banc,* in which *Ravelo* urged the Eleventh Circuit to apply this Court's rulings in ***Apprendi*** and ***Jones*** to the trial court's findings regarding the quantity of cocaine attributable to *Ravelo.* (Pet. App. at 27-43).

B. ***Statement of Facts:***

On April 19, 1996, while working as a confidential informant using the name Elogio Dominquez, Jesus Vasquez met with Orlando Concepcion at the warehouse of New Wave Marina in

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[8] See Eleventh Circuit opinion at sections "H" and "I." (Pet App. at 39-42). *Ravelo* argued at sentencing and in his brief that he should be held responsible for a lesser quantity of drugs, because the case involved a dry conspiracy in where *Ravelo* ceased activity before the commission of substantive act of importation was committed, which was over one year before his arrest. The original indictment charging the dry conspiracy was filed on September 19, 1996, and the United States did not seek an arrest warrant for *Ravelo* until thirteen months later in November, 1997. Twelve days after the arrest warrants were issued in Alabama, *Ravelo* was arrested in Miami, Florida, where he resided. (R1-7,8,9,10, Pet. App. at 1-11).

Miami, Florida.[9] During this meeting, Concepcion told Jesus Vasquez that he was looking for a way to transport cocaine into the United States. (R6-57,58,102).

On April 22, 1996, Jesus Vasquez again met with Orlando Concepcion, and explained the general plan for importing cocaine from Panama. (R8-289). Guerrero said that he could use a company boat to bring the drugs into the country, and they agreed that Concepcion would introduce Guerrero to his partner. (R8-289).

The next day, Concepcion introduced Jesus Vasquez to *Tony Ravelo* at the New Wave Marina. (R6-61-64; R8-289). Miguel Cabal was present at the marina, and they discussed preparations for the importation of cocaine from the Republic of Panama. (R6-63,64).

Thereafter, during another meeting at the New Wave Marina, Jesus Vasquez introduced a second cooperating informant, Joel Guerrero, to Orlando Concepcion and *Mr. Ravelo*. (R6-65). Guerrero was using the name Rauol Rodriguez. (R6-102). During this meeting, further plans were discussed for the transportation of the cocaine. The plans called for Guerrero's bosses to provide a 165 foot vessel with a "ramp" for the loading of a smaller cocaine laden boat

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[9] The actual name for the marina was the New Way Marina, and it was located at 3582 N.W. 82nd Street, Miami, Florida. Orlando Concepcion's automotive and truck shop is at 2503 N.W. 27th Avenue, Miami, Florida. (R7-147; R10-541).

onto the larger vessel. (R6-65-66).

At another meeting during the latter part of May, 1996, Concepcion and *Ravelo* requested Vasquez to install motors on a 33 foot Donzi pleasure boat. (R6-66). According to Vasquez, the Donzi vessel was to be used for the transportation of the cocaine from Panama. (R6-67). During this meeting, a trip was also planned for *Ravelo* and Guerrero to travel to Mobile, Alabama to meet with undercover Agent James Tanner of the United States Customs Service. (R6-68-69). Agent Tanner was posing as Jamie Rivera, the owner of a small cargo freight company that had 150 to 200 foot vessels operating along the Gulf Coast and in Central and South America. (R7-160-61).

On May 23, 1996, *Ravelo* and Guerrero flew to Mobile, Alabama airport to meet with Agent Tanner, who was accompanied by Special Agent Soto. (R7-158). After meeting at the airport, they went to a restaurant for lunch where they had a casual meeting, discussing their backgrounds and general boating topics. (R6-160). *Mr. Ravelo* portrayed himself to the undercover agents and informant as an experienced smuggler. (R7-162).

This meeting continued at the Ramada Inn Hotel in a room that was being both audio and video taped.[10] During this meeting, *Ravelo* continued to

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[10] Over defense counsel's continuous objections, only a portion of this transcript was played to the jury. (R7-163-66,168, Govt Ex. 11, 11T).

portray himself as an experienced smuggler. Tanner asked for an advance of $35,000 for expense money, and *Ravelo* stated he could give him $50,000. (R7-188) However, no such amounts were ever delivered to Agent Tanner. At the conclusion of the May 23rd meeting, undercover Agent Tanner drove *Ravelo* and the informant to the airport. (R7-190).

After *Ravelo* and Guerrero returned to Miami, Florida from the trip to Mobile, Jesus Vasquez stated that he met with Orlando Concepcion and Concepcion told him that "everything was taken care of" and that a second vessel, allegedly containing hidden compartments under the floors, had to be finished in order to do the trip. (R6-70,71). Vasquez explained that Concepcion, Miguel Cabal and *Ravelo* were working on this second boat. (R6-71, 73). Vasquez provided a sketch of this boat to Agent Tanner which Vasquez' daughter drew. (R6-72; R7-146; Govt. Ex. 1).

Around June 12, 1996, Agent Tanner sent sketches of the deck, top view and side view of the cargo vessel to *Ravelo*. (R7-191-92; Ex. 27). On July 12, 1996, after receiving the sketches, *Ravelo* told Tanner over the telephone that he needed larger scale drawings. (R7-194). When Tanner said that he did not have anything larger, *Ravelo* said that he would work with what he had. (R7-194). Thereafter, on July 26, 1996, Tanner sent *Ravelo* photographs of the cargo vessel. (R7-194).

Ravelo testified at trial that he did not work on the vessel during the summer, (R10-559), and avoided

undercover Agent Tanner's calls, even though the endeavor was supposed to be completed in July, 1996, because he did not want to go through with the deal. (R10-561-64). Rather, *Ravelo* explained that he spent the summer doing fatherly things with his son. (R10-559).

Ravelo further testified at trial that as a result of his failure to complete the deal in the summer, during a meeting with informant Joel Guerrero in September, 1996, Guerrero told *Ravelo* that he has put him [Guerrero] on the spot with people who are not "pussy footing around." Guerrero warned *Ravelo* that these people were "for keeps," and would "go to any length or extent to get even" if *Ravelo* failed to perform. Guerrero further told *Ravelo* that he caused Tanner to incur a lot of expense, made them "get this vessel, you've seen their face. You can recognize them at any given time. And they are very mad because they are now believing that you may be a snitch or a Government informant of some kind." (R10-566). Guerrero conveyed that Tanner stated that if *Ravelo* did not complete the job, that he "is going to take action against Mr. Guerrero, my family and myself *[Ravelo]*." *Id.*

Also in September, 1996, Vasquez went to the New Wave Marina warehouse, and observed a Gulfstream fishing boat that Alejandro Torres brought to the warehouse. (R6-79-81, Govt. Ex. 5). At the time Torres delivered the Gulfstream boat, only Concepcion and Cabal were present. (R6-81). According to Vasquez, the Gulfstream boat was at the

warehouse for approximately one week, and during that time, it was simply polished. (R6-82).

The next conversation Agent Tanner had with *Mr. Ravelo* was on September 23, 1996. *Ravelo,* who was in Miami, called Tanner in Mobile, Alabama and engaged in a short conversation for the purposes of setting up another meeting. (R7-197-99; Govt Ex. 12,12T).

Thereafter, on October 1, 1996, the informant, Guerrero, and *Ravelo* traveled to Mobile to meet with Agent Tanner. (R7-201). Upon arriving, Tanner, who was wearing a body recorder, drove Guerrero and *Ravelo* to a restaurant. (R7-201).[11]

At trial, Agent Tanner acknowledged that during this October 1, 1996 meeting, *Ravelo* abandoned the 800 to 1,000 kilogram conspiracy, and discussed a new venture involving approximately 350 kilograms and using smaller boats. (R7-210,245).

Tanner explained that he and *Ravelo* discussed other details of the new smaller smuggling venture, such as Tanner's price to transport the cocaine [illegible]den vessel, the use of a blonde individual on the boat who would not look Spanish, alternative sources of cocaine, and the weather and sea conditions in Mobile, Alabama. (R7-211-217). According to Tanner, *Ravelo* also mentioned that he had a vessel that belonged to "Alex" that could be used in the

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[11]Over *Ravelo's* objection, only a portion of the recorded conversations were admitted and played before the jury. (R7-202-206; Govt Ex. 14, 14T).

venture as a decoy vessel. (R7-218). *Ravelo* also told Tanner that Alex had nothing to do with the smuggling venture. (R7-222).

At the conclusion of the meeting, Agent Tanner drove *Ravelo* and the informant, Joel Guerrero, back to the airport. During the ride, *Ravelo* provided $15,000 for the expenses that Tanner had incurred thus far. (R7-222; Govt. Ex. 13). *Ravelo* also indicated that he would be traveling to Panama to finalize the deal, and would thereafter return to Mobile within "ten days," because he wanted to see the marina where the boat he was bringing from Miami would be launched. (R7-223). However, *Mr. Ravelo* never returned or called Agent Tanner. (R7-224,226,231).

Thereafter, Vasquez testified[12] that on November 5, 1996, he met with Torres, Concepcion and informant Guerrero at the New Wave warehouse and "gave strict orders for Orlando [Concepcion] to get in touch with *Tony [Ravelo]*." (R6-84). In addition, Vasquez claimed that November 5, 1996, Alex Torres told him and Guerrero that the Gulfstream boat would be going to Panama. (R6-85). Afterwards, Concepcion contacted *Ravelo*, and then "they took the boat away." (R6-84). However, Vasquez acknowledged that he never saw who removed the boat. (R6-84).

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[12] However, Mr. Vasquez had no recollection of the events during that meeting, and, over the defendants' objections, refreshed his recollection from the notes. (R6-82-84).

On November 14, 1996, Agent Tanner called *Ravelo* to find out what was going on, and *Ravelo* said that he was going back to Panama to get the load ready. According to Tanner, prior to this call, he (Tanner) tried to reach *Ravelo* several times in Panama and left messages for him in Miami. (R7-224; Govt. Ex. 15,15T). Moreover, after Tanner made this call, *Ravelo* never attempted to contact him again. (R7-231).

Testimony of Special Agent, Joseph Goulet

At trial, Agent Goulet testified that he examined three vessels seized at the time of the arrest of the defendants on October 29, 1997 – 13 months after the original indictment was filed. (R1-1,23,29). The Government offered no testimony or evidence to show that one of the vessels, a "Star Fire," which was seized from defendant Torres' property at the time of his arrest on October 29, 1997, was part of the conspiracy charged in the instant indictment. Based upon this lack of evidence, defense counsel vigorously objected to any testimony regarding the Star Fire.[13]

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[13]Defense counsel also asserted that the Government failed to provide any notice as required under Federal Rule of Evidence 404(b) that any such evidence would be offered at trial. (R9-424). Nevertheless, the District Court denied defense counsel's objections, ruling that such was not 404(b) evidence. (R9-424).

ARGUMENT I

BEFORE INCREASING A DEFENDANT'S STATUTORY MAXIMUM SENTENCE FROM FORTY YEARS TO LIFE IMPRISONMENT ON THE BASIS OF THE QUANTITY OF ILLEGAL DRUGS A DEFENDANT A CONSPIRED TO IMPORT IN A DRY CONSPIRACY, THE PROSECUTION MUST PROVE THE QUANTITY OF ILLEGAL DRUGS BEYOND A REASONABLE DOUBT TO A JURY.

A. Under The Due Process Clause Of The Fifth Amendment And The Notice And Jury Trial Guarantees Of The Sixth Amendment Any Fact (Other Than Recidivism), That Increases The Maximum Penalty For A Crime, Including The Quantity of Illegal Drugs That A Defendant Agreed to Import, Must Be Charged In An Indictment, Submitted To A Jury And Proven Beyond A Reasonable Doubt.

The Eleventh Circuit's affirmance of *Ravelo's* conviction and sentence, and denial of his Petition for Rehearing and Rehearing *En Banc,* directly conflict with the decisions of this Court in ***Apprendi v. New Jersey,*** 530 U.S. _, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and ***Jones v. United States,*** 526 U.S. 277, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). In ***Apprendi,*** this Court squarely held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum

must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* - U.S. at _, 120 S.Ct. at 2362-63.

After the Eleventh Circuit affirmed *Ravelo's* conviction and sentence and denied his petition for rehearing and suggestion for rehearing *en banc,* this Court reversed and remanded numerous drug cases for reconsideration in light of ***Apprendi.***[14] See note 14 below. Like the cases this Court has reversed and remanded for further consideration, the indictment in this case failed to charge the threshold amount of cocaine necessary to support the enhanced penalty provisions of the charging statute, and the jury

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[14] The following drug cases were reversed and remanded for further consideration in light of ***Apprendi: United States v. Humphrey,*** 210 F.3d 373 (6th Cir.2000)(unpublished)(trial court properly calculated of amount of cocaine), *rev'd,* 121 S.Ct. 478, - L.Ed.2d - (Nov.13, 2000); ***United States v. Whitt,*** 211 F.3d 1022 (7th Cir.2000)(sustained trial court's findings regarding quantities of drugs based upon witness testimony at trial), *rev'd,* - U.S. -, 121 S.Ct. 423, - L.Ed.2d - (Nov. 6, 2000); ***United States v. Hughes,*** 213 F.3d 323 (7th Cir. 2000)(same), *rev'd,* - U.S. -, 121 S.Ct. 423, - L.Ed.2d - (Nov. 6, 2000); ***United States v. Smith,*** 215 F.3d 1331 (7th Cir. 2000)(type and quantity of drugs sentencing factors), *rev'd,* - U.S. -, 121 S.Ct. 336, - L.Ed.2d - (Oct. 16, 2000); ***United States v. Hester,*** 199 F.3d 1287 (11th Cir.2000)(amount of marijuana involved not an element of offense that gov't had to prove beyond a reasonable doubt), *rev'd,* - U.S.-, 121 S.Ct 336, - L.Ed.2d - (Oct. 16, 2000); ***United States v. Jones,*** 194 F.3d 1178 (10th Cir. 1999)(a sentencing judge can consider quantities of drugs not charged in information or indictment or proven at trial when determining sentence, and quantities proven at trial do not dictate mandatory minimum), *rev'd,* - U.S. -, 120 S.Ct. 2739, 147 L.Ed.2d 1002 (2000).

instructions and verdict form failed to direct the jury to make a factual finding beyond a reasonable doubt as to the quantity of drugs that *Ravelo* conspired to import.[15] (R1-1,4,17; Ct. Ex. 1-3). Accordingly, at the minimum, this Court should reverse and remand this case for further consideration in light of ***Apprendi*** and ***Jones.***

However, this case also presents this Court with the following issues of national importance:

(a) Whether this Court's holding in ***Apprendi*** *supra,* and/or ***Jones*** *supra*, requires the complete reversal of a conviction due to lack of jurisdiction? and,

(b) Assuming that this Court's holdings in ***Apprendi****, supra,* and/or ***Jones,*** *supra,* only require a

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[15]The jury instructions in the instant case specifically removed the issue of the quantity of drugs from the jury's consideration. The charge instructed the jury that it only had to find a "measurable amount" of cocaine was involved in the offense, but not more than 800 kilograms of cocaine, as the Indictment charged. The charge provided:

> ***The Government is not required to prove the actual amount of the controlled substance that was the object of the alleged conspiracy.*** The Government must prove beyond a reasonable doubt, however, that a measurable amount of the controlled substance was, in fact, the object of the alleged conspiracy.

(R1-118-15)(emphasis added).

As a result, the jury charge did not require the jury to determine whether a "measurable amount" of cocaine was "5 kilograms or more," -- as is necessary to impose the greater penalty provisions of 21 U.S.C. § 960(b)(1)(B).

the trial court to resentence a defendant whose conviction was obtain in violation thereof, whether the trial court must resentence the defendant to an offense level under the United States Sentencing Guidelines that is the lowest possible level for the drug specified in the indictment and charging statute?

(1) The Quantity of Drugs That A Defendant Intended to Import Is An Essential Element of 21 U.S.C. §§ 952 and 960.

In ***Jones v. United States,*** 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), this Court noted that

> under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Id., at 243, n. 6, 119 S.Ct. 1215.

The federal carjacking statute examined in ***Jones,*** set forth a choice of three maximum penalties, two of which were dependent on proof of facts that did not need to be present in the indictment or decided by the jury. 526 U.S. at 229, 119 S.Ct. 1215. The basic statute provided a fine or imprisonment of not more than 15 years for the offense of carjacking, § 2119(1), but if serious bodily injury resulted, the

maximum time in prison was 25 years, § 2119(2), and if death resulted, the maximum was life imprisonment, § 2119(3).

Similarly, in the instant case, Title 21 U.S.C. § 960(b)(1), requires a factual finding to determine if the violation of the applicable statute set forth in subsection (a) involved 5 kilograms or more of cocaine under subsection (b)(1)(A), or over 500 grams but less than 5 kilograms of cocaine under subsection (b)(1)(B). See, Pet. App. at 62-68.

Furthermore, like the indictment in Jones's case, which made no reference to the subsections of the statute, nor did it charge either that the defendant had inflicted serious bodily injury on the victim or death, the indictment herein wholly fails to identify the penalty provisions imposed after trial. *Ravelo's* Indictment not only failed to identify which paragraph of section 960 the government sought to impose, it failed to cite to section 960 altogether, and further failed to state any specific quantity of cocaine that *Ravelo* conspired to import. (R1-17).

The lower courts in ***Jones*** held that the additional facts that triggered § 2119(2) and (3) were nonetheless sentencing factors, but the Supreme Court reversed, holding that the Fifth Amendment Due Process Clause of the Fifth Amendment and Sixth Amendment notice and jury trial require any fact other than a prior conviction[16] that increases the maximum penalty for a crime must be charged in an indictment,

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[16] *Ravelo* had no prior conviction.

submitted to a jury, and proven beyond a reasonable doubt." Id., at 243, n. 6, 119 S.Ct. 1215. *Id.* at 249, 119 S.Ct. 1215.

(2) The failure of an Indictment to Charge an Essential Element of and Offense, Requires Reversal of a Conviction.

The requirement that an indictment contain all the elements of the offense provides a defendant with notice and protection from double jeopardy. See Const. Amd V ("nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"); Const. Amd. VI ("the accused shall enjoy the right ... to be informed of the nature and cause of the accusation"). An indictment also "limit[s] [the defendant's] jeopardy to the offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." ***Stirone v. United States,*** 361 U.S. 212, 218, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). Furthermore, the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." ***In re Winship,*** 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Recently, the Second Circuit examined this issue in the context of the federal firearm statute where the defendants plead guilty to the simple firearms offense, but were enhanced one conviction for discharge of a firearm and imposed a 10 year

consecutive sentence for violation of § 924(c) in connection with a different bank robbery. Instead of merely reversing for resentencing, the court remanded for resentencing or reindictment. ***United States v. Tran,*** - F.3d -, 2000 W.L. 1701651 (2d Cir., Nov. 15, 2000). The indictments in ***Tran*** charged the defendants with a simple § 924(c) firearms offense, to which the defendants plead guilty. *Id.* at 10. Recognizing that the notion that an indictment is a prerequisite to jurisdiction over a criminal case in the federal courts is long established, the Second Circuit held that the district court acted outside its jurisdiction in sentencing the defendants for the enhanced firearms offenses not charged in their indictments. ***Tran,*** at 6, 10, *citing,* ***Ex parte Bain,*** 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887)(indictment found by a grand jury indispensable to the power of the court to try defendant for crime charged).

Similarly, the indictment the grand jury returned against *Ravelo* in the instant case, failed to set forth any notice that the enhanced penalty provisions of § 960 by either citing to the statute or specifying the quantity of cocaine that the grand jury found that *Ravelo* conspired to import. Accordingly, the district court was without jurisdiction to try or sentence *Ravelo,* because the grand jury did not charge *Ravelo* with an essential element of the offense charged.

B. Alternatively, Where a Defendant's Drug Conviction Violates *Apprendi* or *Jones*, The Defendant Should Be Resentenced To The Lowest Level Under The United States Sentencing Guidelines For The Drug Specified in the Indictment and Charging Statute.

As set forth in the points above, in instances such as the instant case where the Indictment fails to allege the penalty provision which would provide the trial court with jurisdiction to impose a minimum mandatory sentence or the quantity of drugs specified in said statute, then the trial court is without jurisdiction to sentence (as well as convict), the defendant.

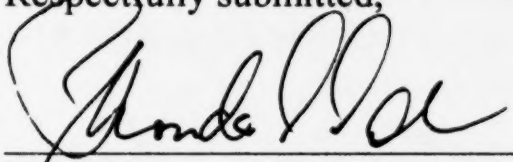
In the event this Court does not rule that the indictment must be dismissed, the Petitioner submits that inasmuch as the petit jury found him guilty of a cocaine conspiracy for an unstated quantity of cocaine, that the trial court would only have authority to sentence him to the lowest quantity of cocaine specified in the United States Sentencing Guidelines.

Accordingly, *Ravelo* submits that the highest base offense level applicable, would be a level 12. See, Pet. App. at 86.

CONCLUSION

For all the foregoing reasons, therefore, *Tony Ravelo* respectfully submits that this Court should grant this Petition for Certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed *via* U.S. Mail, this 6th day of December, 2000, to: ***Solicitor General,*** Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530; and ***Charles A. Kandt, Esq.,*** Assistant U. S. Attorney, 63 South Royal Street, Riverview Plaza, Suite 600, Mobile, Alabama 36602.

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